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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LARRY McNAMEE, Defendant and Appellant.	E040246 (Super.Ct.No. FWV035292) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Supervising Deputy Attorney General, and Scott C. Taylor, Deputy Attorney General, for Plaintiff and Respondent.

On August 2, 2005, for some unknown reason, defendant Christopher Larry McNamee went berserk. He drove a truck (which did not belong to him) toward victim Kathern Rodriguez; according to Rodriguez, he hit her with it, knocking her down. He then deliberately smashed the truck into a parked car. Next, he got out of the truck, got a hammer, and ran toward Rodriguez, who was hiding behind a shipping container. Because she turned and ran, she did not actually see him swing the hammer, but it hit the shipping container, close enough to make her ears ring.

A jury found defendant guilty of unlawful taking or driving of a vehicle. (Veh. Code, § 10851, subd. (a).) It found him not guilty of assault with a deadly weapon, "to wit, [h]ammer" (Pen. Code, § 245, subd. (a)(1)), but guilty of the lesser included offense of simple assault (Pen. Code, § 240). It was unable to reach a verdict on another count of assault with a deadly weapon, "to wit, [m]otor [v]ehicle," and this count was dismissed. Defendant admitted one 1-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) and one "strike" prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). As a result, he was sentenced to a total of four years in prison.

Defendant contends there was insufficient evidence that he swung the hammer toward Rodriguez to support his conviction of assault. He also contends that the trial court misunderstood a question from the jury, which was confused about whether it had to find that defendant swung the hammer toward Rodriguez, and, as a result, it failed to respond adequately to the question.

We will hold that there was sufficient evidence that defendant did swing the hammer toward Rodriguez. We will also hold that any error in the trial court's response to the jury's question was waived by defense counsel's failure to object.

I

FACTUAL BACKGROUND

The scene of the crime was a piece of property in Ontario that housed not only a recycling business and a semitrailer truck parking lot, but also several residences. Victim Kathern Rodriguez managed the property and lived in a log cabin at the rear of the property. Defendant lived in a trailer off to one side. Rodriguez considered defendant to be a friend.

On August 2, 2005, Juan Aguilera arrived with some cable and other items that he needed to prepare for recycling. He parked his Toyota truck behind Rodriguez's cabin, leaving the keys in the ignition.

At first, defendant "wasn't in a bad mood at all." All of a sudden, however, defendant said to Aguilera, "Give me the cigarette, motherfucker," grabbed the cigarette that Aguilera was smoking out of his mouth, and began to smoke it himself. He continued to yell at Aguilera, although Aguilera, who spoke only Spanish, did not understand what he was saying.

Defendant got into Aguilera's truck and started it up. From defendant's gestures, Aguilera understood that he wanted everyone to leave, "because it was his yard." Defendant drove the truck toward Rodriguez, who was standing in front of her cabin.

According to Rodriguez, however, she stepped out of her cabin "because [she] heard a bunch of commotion outside"; she saw Pancho[1] run by, then turned and saw the truck coming at her. It hit her and knocked her down. However, she admitted telling a police officer that the truck did not hit her; rather, she tripped on a hose.

Defendant then put the truck in reverse and drove it back toward Aguilera. Finally, he drove it forward again and hit a parked blue Geo "two or three times . . . ."

According to Aguilera, defendant got out of the truck, went to his trailer, and came back with a hammer. He yelled at Rodriguez, "Bitch, give me the money," then "went after [her] with the hammer." Aguilera ran and hid behind Rodriguez's cabin. Defendant and Rodriguez went out of his sight. He heard a "crash," which he took to be the "blow of a hammer on a trailer . . . ." He then heard Rodriguez shout or scream. He admitted, however, that he did not see defendant swing the hammer.

According to Rodriguez, she ran behind some shipping or storage containers. Then:

"A . . . I turned around and seen [defendant] and took off running . . . .

"Q When you saw [defendant], did he have anything in his hand?

"A Yes, he did. It looked like a hammer. [¶] . . . [¶]

"Q . . . Did he swing the hammer?

"A Yes, and he hit the [container] when I took off running. . . .

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[1] Pancho lived in another trailer on the property and was responsible for "maintain[ing] the trailers."

"Q . . . Was the defendant behind you or in front of you?

"A He came up from behind. That's why I didn't see him.

"Q And when you turned around, is that when he swung the hammer?

"A The same time I turned around, I was running, so yeah.

"Q Okay. So how close was the hammer to you, if you know, when he swung it?

"A I don't know exactly how close. Like I said, I turned around to . . . try to get away from him. But it made my ears ring when he hit the [container], that's how close it was."

Rodriguez also testified:

"Q . . . [T]hat's where [defendant] attacked you?

"A If you can call it that, yes.

"Q Okay. That's where you said he came at you with the . . . hammer?

"A Right.

"Q . . . And he came at you with full force . . . ?

"A I have no idea. Like I said, I turned around and ran. I just heard the thing hit the metal.

"Q I hit so hard it made a loud sound?

"A Yes, it made my ears ring.

"Q . . . [S]o there was an actual swing to the storage container?

"A Yes."

Later, she testified:

"A . . . I seen him -- his hand coming up and I just took off running.

"Q So you saw him raising his hand with the hammer.

"A . . . [Y]es."

Rodriguez alsotestified that she ran "[t]o make sure [the hammer] didn't hit me."

A police officer found two hammers on top of a table in defendant's trailer. At trial, when Rodriguez was asked whether a hammer she had been shown was "the hammer that the defendant swung at you," she answered, "Yes." She also told the officer "that the defendant swung at her" and hit a metal shipping container. However, his police report "d[id] not record any point of impact on the . . . container . . . ."

II

THE SUFFICIENCY OF THE EVIDENCE

OF AN ASSAULT WITH THE HAMMER

Defendant contends that there was insufficient evidence that he swung the hammer toward Rodriguez to support his conviction for assault with the hammer (count 2).

"In resolving such a claim, a reviewing court must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 722, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) "'[W]e review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value --

from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citation.] 'The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Ramirez* (2006) 39 Cal.4th 398, 463, quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1212 & *People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) "An assault occurs whenever '"[t]he next movement would, *at least to all appearance*, complete [a] battery."' [Citation.]" (*People v. Williams* (2001) 26 Cal.4th 779, 786, quoting *People v. Colantuono* (1994) 7 Cal.4th 206, 216, quoting Perkins & Boyce, Criminal Law (3d ed. 1982) p. 164.) In addition, the intent element of assault requires that the defendant "must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Williams*, at p. 788.)

However, "[o]ne may commit an assault without making actual physical contact with the person of the victim . . . . [Citation.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) "'Once a defendant has attained the means and location to strike immediately he has the "present ability to injure." The fact an intended victim takes effective steps to avoid injury has never been held to negate this "present ability."' [Citation.]" (*People v. Raviart* (2001) 93 Cal.App.4th 258, 267, quoting *People v. Valdez* (1985) 175 Cal.App.3d 103, 113.)

Plainly, defendant was on a violent rampage. He had just used the truck to ram the parked Geo, two or three times. From the very fact that he was chasing Rodriguez with a hammer, it was fairly inferable that he intended to hit her with it. According to Aguilera, defendant "went after [Rodriguez] with the hammer." Rodriguez, for her part, saw defendant "c[o]me at [her] with the . . . hammer." Just as she "saw him raising his hand with the hammer," she turned and ran. Admittedly, neither Rodriguez nor Aguilera actually saw him swing the hammer. Nevertheless, Rodriguez testified that she ran "[t]o make sure it didn't hit me." Evidently, to her, at least, defendant's next movement would have completed a battery. She also testified, "[I]t made my ears ring when he hit the [container], *that's how close it was*." (Italics added.) Immediately after Aguilera heard the hammer hit the shipping container, he heard Rodriguez shout or scream. It was fairly inferable that defendant missed only because, just at that moment, Rodriguez saw him and ran.

Finally, Rodriguez herself drew this inference. When the police interviewed her, she told them "that the defendant swung at her . . . ." At trial, when asked if she recognized "the hammer that defendant swung at you," she answered, "Yes." Even though she did not actually see him swing the hammer at her, this was an opinion that could be rationally based on her perceptions. (See Evid. Code, § 800, subd. (a).)

Accordingly, we conclude that there was sufficient evidence that defendant committed an assault with the hammer.

III

JURY QUESTION

Defendant contends that the trial court responded erroneously to a question from the jury.

A. *Additional Factual and Procedural Background*.

During its deliberations, the jury sent out a note asking: "[I]n order to prove assault with a deadly weapon, does the willful intent have to be against an individual or can it be general intent[?]" At the same time, but in a separate note, it requested a readback of the "test[i]mony of Kathy Rodriguez concerning her see[ing] [defendant] raising the hammer."

The trial court convened counsel for both sides. The particular attorneys who had appeared at the trial were unavailable, but other attorneys made special appearances for them. The court read the jury's question to them, then stated, "I'll indicate that assault with a deadly weapon is a general intent crime." There was no objection. Accordingly, it called the jury in and instructed: "The answer is it's a general intent crime, so you just have to have the intent to do the act." It then had the court reporter provide the requested readback.

B. *Analysis*.

Defendant argues that what the jury really wanted to know was not whether assault was a general intent crime (as opposed to a specific intent crime), but rather whether the force had to be directed against an individual (as opposed to a shipping

container). The meaning of the jury's question is open to debate. We think it most likely that it was directed at count 1, which charged defendant with assault with a deadly weapon by means of Aguilera's truck. There was some evidence that he was using the truck to chase Pancho, when Rodriguez came out of her cabin and he hit her instead. Rodriguez even testified that "[h]e was going after Pancho." Ultimately, the jury was unable to reach a verdict on this count. Thus, the jury may have been asking whether assault required the intent to hit the particular individual who was actually hit. We need not decide what it "really" meant, however, because defense counsel waived the asserted error.

"The court has an obligation to rectify any confusion expressed by the jury regarding instructions, but has discretion to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citations.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 1009.) However, "[w]hen a trial court decides to respond to a jury's note, counsel's silence waives any objection . . . . [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 729; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 430.)

Defendant argues that the trial court "misdirected the jury as to the elements of a crime" -- an error that is not normally waived by failure to object. (See Pen. Code, § 1259.) The trial court, however, had already given the jury legally correct instructions on the elements of assault; among other things, it had instructed that assault requires "an act which by its nature would probably and directly result in the application of physical force on another person . . . ." Its response to the jury's question -- that assault with a

deadly weapon is "a general intent crime" -- was also legally correct. Thus, defendant is reduced to contending, in essence, that the trial court should have given an amplifying or clarifying instruction. This type of contention can be waived by failure to object, and is. (*People v. Horning* (2004) 34 Cal.4th 871, 909.)

Defendant also argues that applying the waiver rule, on these facts, would deny him the right to counsel. He notes that the particular attorney who failed to object was making a special appearance for his trial counsel. He claims that "[o]nly the lawyers who conducted the trial" could have understood the jury's question. He concludes that "the presence of a defense attorney who was wholly ignorant of the facts was tantamount to a denial of [his] right to counsel."

Defendant, however, *was* represented by counsel. The appellate record fails to demonstrate that the attorney who was making a special appearance was, in fact, ignorant of the facts of the case. Defendant cites *Little v. Superior Court* (1980) 110 Cal.App.3d 667 and *In re Cassandra R.* (1983) 139 Cal.App.3d 670. In both of those cases, however, the trial court forced the particular attorney appearing before it to represent the defendant, even though he affirmatively asserted that he was not prepared to do so. (*Little*, at p. 670; *Cassandra R.*, at pp. 673-675.) That is not what happened here.

Rather conspicuously, defendant does *not* seem to be claiming ineffective *assistance* of counsel as an independent ground for reversal (see Cal. Rules of Court, rule 8.204(a)(1)(B) [each point in brief must be stated under separate heading]) -- perhaps because he would then have the burden of rebutting the presumption that his counsel had

some sound strategic reason for his failure to object (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 746), which, on this record, he cannot do.

We therefore conclude that any error in the trial court's response to the jury's question has been waived.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.